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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of PONTEA and FARAMARZ FATEHI.	
PONTEA DAVOUD FATEHI, Appellant, v. FARAMARZ FATEHI, Respondent.	G037459 (Super. Ct. No. 00D007106) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Pontea Davoud Fatehi, in pro. per., for Appellant.

No appearance for Respondent.

This is a child custody matter. Under the terms of the 2001 final marital dissolution judgment, Pontea Davoud Fatehi (Mother) was given sole physical custody of her two daughters. Last year, she appealed from an order modifying the custody order to joint physical custody with Faramarz Fatehi (Father). The order also prohibited Mother from changing her eldest daughter's elementary school. We reversed the order, agreeing with Mother's argument the court applied the wrong legal standard when considering the modification request.

While the matter was pending on appeal, the parties continued to have disagreements, resulting in more court filings. In December 2005, the court accepted the parties' stipulation to joint custody with a modified visitation schedule. When the trial court later received our opinion reversing the custody modification order, it ruled the December 2005 stipulation/order was controlling. It denied Mother's motion for reconsideration. Finding none of her contentions on appeal have merit, we affirm the court's order.

I

This case dates back to June 2000, and a detailed summary of the procedural history is contained in our prior opinion (*In re Marriage of Fatehi* (G035148) May 31, 2006 [nonpub. opn.]). Because the issue in this appeal is solely procedural, we will highlight only the pertinent facts.

Father and Mother have two daughters who are now eight and five years old. The dissolution judgment was entered in July 2001. The court accepted the parents' stipulation in which they agreed to share joint legal custody and Mother would have sole physical custody of the children. Father was given liberal visitation rights: He was to have the children every other Wednesday night until Saturday morning. In addition, he was to visit every other Saturday night until Monday morning. A schedule for holidays, birthdays, and other special occasions was also designated.

On December 3, 2003, Father filed an ex parte application asking the court for an emergency order mandating his eldest daughter, Ariyana, be "immediately re-enrolled at Deerfield Elementary School" and he be awarded sole physical custody of both children. He asserted Mother had essentially abandoned the children in September 2002, but now wanted the children back and planned to move Ariyana to a different elementary school near her house. The court granted the motion that day, ordering Ariyana "be re-enrolled and continue school at Deerfield . . . ." It made a temporary child custody and visitation order giving sole physical custody to Father and visitation every weekend to Mother.

Mother responded by declaring Father had "portrayed a false, misleading, and untrue portrait of his temporary custodial time with the children." Due to a substantial reduction in child support, Mother enrolled in a full-time cosmetology program at Fullerton College. Mother claimed she and Father agreed to have the children: (1) stay with his parents while she was in school; (2) return to her during the summer break; and (3) return permanently to her home when she graduated in November 2003. Mother believed this arrangement would be in the children's best interests because otherwise they would have to wake up much earlier than needed to be taken to day care.

Mother made arrangements for Ariyana to transfer from Nohl Canyon Elementary School (near her house) to Deerfield (the school near Father's and the grandparents' house). From February to July, the children stayed primarily at the grandparents' home and were with Mother on school holidays and on each weekend. As agreed, the children returned to Mother's sole custody during her summer break. During this time, Father saw the children according to the terms of the visitation schedule as ordered in the 2001 judgment.

In mid-August, Mother returned to her classes and the children went to stay with Father and his parents. Mother asserts, "At that time I reiterated that this arrangement was temporary and only until November when I graduated. Once again

[Father] fully agreed." Ariyana returned to Deerfield. When Mother finished her coursework in November, she told Father she would make the arrangements for Ariyana to transfer back to Nohl Canyon Elementary School in December. Father decided the children should stay with him and he obtained the ex parte sole custody award.

On December 22, 2003, the court asked the parties what arrangements they wanted to make concerning the holidays and visitation before their order to show cause (OSC) hearing set for January 28, 2003. The court pointed out there were only three weekends to deal with before the next hearing. Then, after considering input from the parents, the court fashioned an interim custody and visitation order stating, "Pending hearing or further order of the court, [¶] (a) Ariyana shall attended Deerfield School [¶] (b) Mother shall have the children from Dec[ember] 23 . . . until Dec[ember] 30, 2003, at 11:00 a.m. [¶] (c) Father shall have the children from Dec[ember] 22 until Dec[ember] 23 . . . and from Dec[ember] 30 . . . until Jan[uary] 4 . . . [¶] (d) Mother shall have the minors each weekend from 3:00 p.m., on Fridays with the return to school Monday morning (and return of [the youngest daughter] to grandparents or other agreed upon caretaker) . . . [¶] (e) Mother shall pick up and deliver the children under this order. . . ."

Unfortunately, the OSC hearing was continued for over one year due mostly to requests made by Father. Finally, in December 2004, the court held a two-day hearing and considered testimony, documentary evidence, and counsel's arguments. It noted both sides were asking for a change. Mother was requesting a return to the July 2001 judgment, and Father was relying on his de facto status of having primary custody after the December 2003 ex parte hearing. It concluded both parents had made an initial showing there had been a change of circumstances and both had "the burden of convincing the court that the custodial arrangement they would like to have is in the best interests of the children."

Applying this standard, the court concluded it was in the best interests of the children to award joint physical custody and noted joint legal custody was already in

effect. It adopted the "physical custodial arrangement order of [December 22, 2003]." The order was entered December 28, 2004.

While Mother's appeal of this order was pending, the parties returned to the trial court due to several disagreements. First, Mother filed an OSC seeking an award of primary physical custody of the children and monitored visitation with their Father. She provided documentation of the unlawful detainer action pending against Father for his failure to pay rent. She stated Father was going to be evicted and she had evidence he was unemployed. Ariyana told Mother that Father was going to take them away to live somewhere else. Mother stated she was concerned Father would take the children and leave the country. She was having difficulty contacting her children on the telephone when they stayed with their Father.

At an ex parte hearing on May 12, 2005, the parties stipulated the children would be available for the phone contact between the hours of 3:00 p.m. and 5:00 p.m., each day. The parties agreed they would not change their daughters' residence without first obtaining a written agreement from the other party or a court order. A hearing was scheduled for June 24, 2005.

On that same day, without giving Mother notice, Father filed an ex parte motion for a temporary restraining order against Mother. The court denied the ex parte application, and set the motion for a hearing on July 25, 2005.

Mother moved to continue the June 24 hearing on her OSC because her child was ill and had to be hospitalized. The court granted a continuance to June 29. On that day, the court's minute order indicated Mother called the court to request the matter be taken off calendar. She refiled the OSC petition on July 8, and a hearing was scheduled for August 24. Mother next filed an ex parte motion to stay the December 2004 custody and visitation order pending the appeal. The ex parte motion was "denied pending hearing" set for August 26. However, our record does not contain any evidence

showing there was a hearing or ruling on the motion for a stay. Mother does not discuss the outcome of this motion in her brief.

On July 25, 2005, the court considered the testimony of several witnesses before denying Father's request for a restraining order. A few weeks later, Mother filed an OSC seeking appointment of counsel for the two children. The hearing was scheduled for the same day as Mother's other OSC regarding custody and visitation (August 24).

At the August 24th hearing, the court considered testimony and argument from counsel. On the record, the court stated its "tentative" was not to change the custody arrangement due to the lack of evidence. However, based on the record, the court determined it would be in the children's best interests to be represented by counsel. It added, "Neither of you folks are especially credible to me. You're both blossoming stuff up right. So right now I'm having a hard time figuring out where the truth lies. But, I know both of you appear to desperately want to have the children for your own. Definitely, this does qualify as a high conflict custody matter." The court continued the matter to give minors' counsel an opportunity to prepare and submit a report. At the request of minors' counsel, the hearing was continued to November. Then it was continued to December by Mother's counsel.

Minors' counsel submitted a report in which she concluded that based on her investigation the children "appear[ed] to enjoy a close relationship with both their parents and stepparents, but the antipathy between the adults appears to have some adverse consequences upon the minor children. It is suggested the court may wish to order the parties to attend a conjoint parenting class . . . ."

At the hearing on December 23, 2005, the parties met and reached a stipulation as to some of the issues. The minute order shows the stipulation was received and accepted by the court. Minors' counsel was relieved from her appointment and provided an order for payment. In the stipulation the parties agreed: (1) to continue with joint legal and physical custody; (2) all parties, including stepparents, shall participate in

conjoint parenting classes; (3) to a shared custodial arrangement consisting of a three day/four day time share, with Father having the children from after school on Thursday to Saturday at 8:00 p.m. Mother will have the children each week from Saturday (8:00 p.m.) to the beginning of school on Thursdays; and (4) the minors shall be enrolled at Deerfield.

Within a few months, Mother filed another OSC petition requesting modification of custody and visitation. Before the hearing, this court's opinion reversing the December 2004 joint custody order was filed. The following day, the parties submitted a copy of the opinion to the trial court and it trailed Mother's OSC hearing. The court asked the parties to submit briefs on the effect of the appellate court's ruling, and reappointed counsel to represent the minors. The minute order stated the December 2005 custody and visitation orders would continue to remain in full force and effect.

Before the next hearing, minors' counsel submitted a report in which she concluded it would be in the children's best interests to have a "very specific physical custody arrangement." Moreover, she suggested that because Mother had stated she intended to move, the court should render an order about future school enrollment, summer vacation, and holidays to avoid any further confusion.

On June 30, 2006, the court ruled the "controlling order" was the one entered on December 23, 2005. It reasoned that under Code of Civil Procedure section 917.7 the trial court retains jurisdiction to issue orders regarding custody and visitation pending an appeal. The court stated judicial economy would not be served if a party were permitted to seek modification of custody, while the case is pending on appeal, "claiming there is a change of circumstances that require a new and different order, stipulating to a new and different order, and then coming back and saying 'well, I like the result in the appeal better.'" It also concluded that reverting to the 2001 order would disrupt the consistency the children need, and the family court strives to achieve.

Using the December 2005 joint custody order as a starting point, the court determined there was insufficient evidence of changed circumstances to warrant modification of the order. The parties were given an opportunity to discuss the matter, and returned with a stipulation regarding custody time during the summer vacation months. Father was ordered to enroll in and attend parenting classes. The matter was then continued to August 2006. Mother's subsequent motion for reconsideration was denied. The court also ruled the children should attend the local school in Irvine, near both parents' homes. Mother appealed the June 30, 2006 order.

II

"'The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test.' [Citation.] Under this test, we must uphold the trial court 'ruling if it is correct on any basis, regardless of whether such basis was actually invoked.' [Citation.]" (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255 (*Montenegro*).)

III

The issue presented in this appeal is the effect of Mother's 2005 stipulation to continue with a plan of joint physical custody while she was challenging a joint physical custody order on appeal. She argues the court should have ruled the 2005 stipulation/order was temporary, and should have reinstated the original 2001 sole custody order after receiving our appellate opinion. We conclude the trial court made the right decision.

Code of Civil Procedure section 916, subdivision (a),[1] provides, with certain exceptions, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby . . . ." The purpose of the rule is to protect the jurisdiction of the appellate court "and prevents trial courts from rendering the appeal futile by changing the judgment into

[1] All further statutory references are to the Code of Civil Procedure.

something different. [Citations.] Accordingly, whether a matter is 'embraced' in or 'affected' by a judgment within the meaning of . . . section 916 depends on whether postjudgment proceedings on the matter would have any effect on the 'effectiveness' of the appeal. [Citation.]" (*In re Marriage of Horowitz* (1984) 159 Cal.App.3d 377, 381 (*Horowitz*).)

One exception to the above rule is found in section 917.7, which provides an appeal will not automatically stay proceedings in the trial court that affect custody of a minor.[2] As noted many years ago in *Mancini v. Superior Court* (1964) 230 Cal.App.2d 547, 555-556 (*Mancini*), this exception "may render one or more appeals taken from custody orders moot before they are heard," and it is foreseeable "more than one modification might be made pending appeal." The aggrieved party can question the validity of any modifications by supersedeas. (*Id.* at p. 556.) The *Mancini* court reasoned, "This construction we believe effectuates the intention of the Legislature, fixes the trial court as the forum for taking evidence which is the place where it belongs, and protects the appellate court's jurisdiction. [Citations.]" (*Ibid.*)

Here, Mother invoked this court's jurisdiction when she appealed the December 2004 joint custody order. She did not obtain a stay of that joint custody order, but rather, while the appeal was pending, she invoked the trial court's jurisdiction by filing an OSC requesting sole custody due to a change in circumstances. In essence, Mother tried to litigate the same custody issue in two forums. Under section 917.7, the trial court had original jurisdiction to render a final custody order, regardless of the

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[2] Section 917.7, provides in relevant part, "The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child in any civil action, in an action filed under the Juvenile Court Law, or in a special proceeding, or the provisions of a judgment or order for the temporary exclusion of a party from a dwelling, as provided in the Family Code. However, the trial court may in its discretion stay execution of these provisions pending review on appeal or for any other period or periods that it may deem appropriate . . . ."

appeal. And, because the trial court ruled *before* the appellate court, we must conclude the trial court's order is controlling. There is no legal or equitable reason to rule Mother should be given the opportunity to wait and see which ruling she liked better.[3]

Matters may have turned out differently if Mother had sought and was granted from the trial court, or the appellate court, a stay of the joint custody order she was appealing. (§ 917.7.) The record shows she filed a motion to stay the order with the trial court, but it was *after* she had filed the OSC requesting sole custody due to a change in circumstances. In short, she first sought modification of the order before trying to stay it. The record reflects the motion was never ruled on, and this is likely because before the hearing date Mother stipulated to joint custody. The request for a stay of the order became moot, just as Mother's appeal of the order became moot. It is unfortunate our court was not informed of this development.

IV

Citing part of a sentence from *Mancini,* Mother argues a trial court's custody order pending appeal is only temporary and "merely pending the determination of the appeal." (Citing *Mancini, supra,* 230 Cal.App.2d at p. 555.) She misunderstands the court's holding and reasoning in that case.

In *Mancini,* the court addressed for the first time whether a trial court had authority to modify a custody provision of an interlocutory decree while an appeal of the decree was pending. The court noted that prior to 1955, the appeal of a child custody order stayed execution of the order until the appeal was determined. (*Mancini, supra,* 230 Cal.App.2d at p. 551.) "Emergency situations [with] respect [to] a child's welfare could be and were cured only by the appellate courts. . . . [Appellate] court[s] had the power to make a custody order pending appeal. [Citation.]" (*Id.* at p. 551.)

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[3] Certainly, if the trial court had granted her sole custody modification request, Mother would have withdrawn her appeal as moot rather than risk the chance we would have affirmed the joint custody order.

In 1955, legislation was enacted to eliminate the automatic stays of orders concerning custody. (*Mancini, supra,* 230 Cal.App.2d at p. 552.) The *Mancini* court noted the cases agreed applications for a stay were to be made first in the trial court, and then to an appellate court. (*Id.* at p. 553.) However, no case had addressed yet whether the trial court possessed jurisdiction to modify a custody order pending appeal. (*Id.* at p. 554.) The *Mancini* court held, "We believe the effect of [section 917.7] was to vest the trial court with original jurisdiction and the appellate courts with appellate jurisdiction pending appeal, not only in respect of a stay, but also in respect of modification." (*Ibid.*)

It found support for this conclusion in the legislative history, stating, "Suffice it to say the Legislature was seeking a cure to the problem created when a child is adversely affected by a change in circumstances requiring a modification of an existing order, but which modification when made, could be rendered abortive because of an automatic stay effected forthwith by perfecting an appeal. . . . The Legislature recognized that the trial court should in spite of the appeal have the discretionary power to make, vacate and modify custody orders [citation]; and thus gave to the trial court this power, which prior to enactment of [section 917.7] could be exercised only by an appellate court. [Citation.]" (*Mancini, supra,* 230 Cal.App.2d at p. 554.) The *Mancini* court noted the trial court's stay of an order was also a means to regulate, limit, and modify the affairs for the child during review. "A custody order is generally not made unless the trial court had determined it should be effective forthwith." (*Id.* at p. 555.)

The *Mancini* court recognized the trial court's authority to make custody orders pending appeal under section 917.7 "may render one or more appeals taken from custody orders moot before they are heard[.]" (*Mancini, supra,* 230 Cal.App.2d at p. 555.) It reasoned, "Such modification, however, except that it is made by the trial court, is no different than one made by an appellate court prior to the enactment of section [917.7], merely pending the determination of the appeal from the order in respect of which the appeal is taken. [Citation.] This difference is now pregnant with an added

remedy since the aggrieved party has the added right to question the validity of the trial court's modification by supersedeas." (*Id.* at pp. 555-556.)

Thus, contrary to Mother's contention, the *Mancini* court did not hold that custody orders made while an appeal was pending were merely temporary orders. Rather, it determined that just as appellate courts once had original jurisdiction to make custody orders during a pending appeal, trial courts were now vested with authority under the new statutory scheme. The court specifically recognized in some instances the trial court's custody order may render the appeal moot before it is heard. (*Mancini, supra,* 230 Cal.App.2d at pp. 555-556.) A temporary trial court order would not have this kind of an effect on an appellate court's jurisdiction.

V

Mother's reliance on *Horowitz, supra,* 159 Cal.App.3d 377, is also misplaced. She argues the case contains the rule that when an order is reversed on appeal, the trial court must rewind the clock and start over, considering any change in circumstances for future orders. Mother believes that in her case the court was required to reinstate the 2001 sole custody award and Father had the burden of showing changed circumstances warranted a modification to joint custody. She is wrong.

The parties in *Horowitz* appealed an interlocutory judgment, which included a modifiable spousal support provision "with the trial court retaining jurisdiction over the issue[.]" (*Horowitz, supra,* 159 Cal.App.3d at p. 382.) While their appeals were pending, wife obtained a wage assignment and moved for an order that husband pay the support ordered in the judgment or pay temporary support pending appeal. (*Id.* at p. 380.) Husband moved to terminate the wage assignment as well as any temporary spousal support obligation. (*Ibid.*) At the hearing, the court discovered wife's financial circumstances had significantly changed and terminated husband's support obligation, but retained jurisdiction over the matter. (*Ibid.*)

The issue decided by the *Horowitz* court was "whether, upon changed circumstances, a modifiable spousal support obligation is a matter 'embraced' in or 'affected' by an interlocutory judgment ordering payment of spousal support, so that modification proceedings in the trial court are stayed pending an appeal" pursuant to section 916. (*Horowitz, supra*, 159 Cal.App.3d. at p. 381.) It held the trial court had authority, upon a showing of changed circumstances, to modify an otherwise modifiable spousal support order pending appeal. The court reasoned the modification "did not alter the effectiveness of the appeals from the judgment, because the same result could have been achieved through other means without having any effect upon the effectiveness of the appeal or rendering it futile." (*Id.* at p. 382.) Husband could have posted a bond to stay the spousal support provision, and wife would have likely obtained a temporary support order pending appeal and received a reduced payment upon a finding of changed circumstances. (*Ibid.*) The court also noted, "If the appellate court subsequently affirmed the judgment, thereby renewing the efficacy of the permanent spousal support provisions throughout the pendency of the appeal, the trial court would still have equity jurisdiction to refuse to enforce the stayed order . . . thus in effect retaining the reduction in support payments. [Citation.] If the appellate court reversed the spousal support provisions of the judgment and remanded the cause for a redetermination of the spousal support issue, on remand the trial court would be authorized to consider the change in circumstances in ordering future spousal support, if any, [citation], so that, again, the same result would be achieved." (*Id.* at p. 382, fn. omitted.)

Mother recognizes the *Horowitz* case concerns spousal support rather than custody, but argues this makes no difference to "the rule" regarding a court's obligation when faced with an appellate reversal. She asserts the only difference between the two awards is that spousal support changes involve a lesser showing of changed circumstances than custody modifications. Not so.

The trial court's jurisdiction over a spousal support award is governed by section 916, not section 917.7. As discussed in *Horowitz,* under section 916 the trial court is limited to modifications that will not render the appeal moot or alter the effectiveness of the appeal. (*Horowitz, supra*, 159 Cal.App.3d at pp. 381-382.) The court recognized that if equity requires a temporary change in the spousal support obligation pending appeal, the matter can always be reevaluated and reconsidered on remand from the appellate court. (*Ibid.*) However, the same procedure does not apply to custody orders governed by section 917.7. Recognizing the best interests of children should not be impaired by the appellate process, the Legislature vested the trial court with original jurisdiction with respect to custody issues. (*Mancini, supra,* 230 Cal.App.2d at p. 555.) Unlike the reduction of spousal support pending appeal, a trial court's modification of a custody order may render an appeal moot. (*Ibid.*) The *Horowitz* case is not binding authority.

VI

The court's June 30, 2006 order is affirmed. Respondent shall NOT recover costs on appeal because he made no appearance.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.